IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHAELA M.,	)	
	)	2 CA-JV 2007-0035
Appellant,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ARIZONA DEPARTMENT OF	)	Rule 28, Rules of Civil
ECONOMIC SECURITY,	)	Appellate Procedure
ALEX A., and KALEB M.,	)	
	)	
Appellees.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. JD200500046

Honorable Ann R. Littrell, Judge

VACATED IN PART, REVERSED IN PART, AND REMANDED

Dicampli, Elsberry & Hunley, LLC
By Anne Elsberry
Tucson
Attorneys for Appellant

Terry Goddard, Arizona Attorney General
By Pennie J. Wamboldt
Tucson
Attorneys for Appellee Arizona
Department of Economic Security

V Á S Q U E Z, Judge.

¶1 Appellant Michaela M. challenges the juvenile court's April 30, 2007, order terminating her parental rights to Alex A. and Kaleb M. after the court entered a "default"

against Michaela when she failed to appear at the March 22, 2007, pretrial conference.[1] We vacate the termination order and reverse the juvenile court's order denying Michaela's motion to set aside the default.

¶2 Alex, born in March 2003, and Kaleb, born in October 2004, were adjudicated dependent in November 2005 after Michaela pled no contest to certain allegations in a dependency petition. In December 2006, the court changed the case plan goal from reunification to severance and adoption. Thereafter, the Arizona Department of Economic Security (ADES) filed a motion for termination of the parent-child relationship. The juvenile court held an initial termination hearing on January 4, 2007, which Michaela attended with her attorney. At that time the court set the pretrial conference for February 16 and the severance hearing for March 1. But on February 15, on motion of the children's counsel filed the day before, the court continued the pretrial conference and severance hearing to March 22 and March 30, respectively.

¶3 Michaela did not appear at the March 22 pretrial conference. Her attorney, Bernadette Burick, appeared telephonically. Although we have not been provided a

[1]We note the juvenile court and the parties use the term "default." But as Division One of this court recently pointed out in *Christy A. v. Arizona Department of Economic Security*, 217 Ariz. 299, ¶ 14, 173 P.3d 463, 468 (App. 2007), that term does not appear in the relevant juvenile rules or statutes. *See, e.g.*, Ariz. R. P. Juv. Ct. 65(C)(6)(c), 66(D)(2); A.R.S. § 8-863(C). Rather, as discussed below, if a parent fails to appear at certain hearings without good cause, the parent is deemed to have waived his or her rights and admitted the allegations of the motion to terminate parental rights. *Christy A.*, 217 Ariz. 299, ¶ 14, 173 P.3d at 468. The court stated in *Christy A.*, "it is apparent that, in practice, the juvenile court has engrafted the concept of 'default' from Rule 55 of the Arizona Rules of Civil Procedure . . . into the juvenile court rules or, at least, is utilizing the 'default' terminology when a parent fails to appear." *Id*.

transcript of that hearing, the court stated in its minute entry: "The Court advised the mother (sic) had been informed of the consequence if she did not appear for this proceeding." The court then entered "the mother's default," adding, "[i]f there is an exceptional reason for the mother's non-appearance or a meritorious defense a motion can be filed."

¶4 Burick filed a motion to aside the default in which she stated she had not notified Michaela about the rescheduled pretrial conference, adding that Michaela "did not have notice regarding the date and time of the March 22, 2007, hearing." Burick also stated that Michaela did "not have a history of failing to appear and ha[d] made the scheduled court appearances in this case." The juvenile court held a hearing on Michaela's motion on March 30 before going forward with the severance hearing.[2] Michaela attended the hearing with Burick, who explained to the court that she had not calendared the pretrial conference. Burick stated repeatedly that she had not called Michaela or written to her informing her that the pretrial conference had been reset for March 22. Burick argued Michaela could not be defaulted because she did not have notice of the pretrial conference, because she had appeared at the severance hearing, and because "this is a serious matter, one that would sever her parental rights."

¶5 ADES argued in response that, because Michaela had been defaulted, pursuant to Rule 55(c), Ariz. R. Civ. P., she could not "participate any further in the proceedings at

[2]Although a parent who fails to appear at certain hearings is deemed to have admitted the allegations of a motion to terminate the parent's rights, the juvenile court may terminate the parental rights only if "the record and evidence presented" support the termination order. Ariz. R. P. Juv. Ct. 64(C); *see also* A.R.S. §§ 8-537(C), 8-863(C).

all, other than to file a motion to set aside the default." ADES maintained that, based on case law, which ADES did not cite, Michaela's motion to set aside the default was insufficient because it was not supported by sworn statements, such as affidavits or deposition testimony, nor was it verified. ADES also argued that a default could not be set aside unless the defaulted party presented "a meritorious defense . . . by sworn statements, either deposition or affidavit." Although it is unclear, ADES's counsel's comments suggest the meritorious defense it was referring to was a defense for Michaela's failure to appear, rather than to the allegations in the motion to terminate her parental rights.

¶6 Apparently viewing a meritorious defense in the same way as ADES, Burick then stated:

> There is no meritorious defense, Judge. I have spoken with Michaela. Michaela did not have notice and, Judge, if you look at the rule, the rule does specifically state that notice should be given in this case. I don't believe that Michaela had had notice. It's not like she's failed to appear at all these hearings. She's generally here.
>
> She—if she couldn't have—couldn't drive in from Wil[l]cox, she called in, Judge. She's not one that failed to appear at these hearings.

The court responded, "Well, Ms. Burick, what I'm not hearing you offer is any verified testimony or meritorious defense." Burick answered, "I understand, Judge, and I don't have a meritorious defense. I just have Michaela that states that she did not get notice and I guarantee, Judge, that I did not send her a letter, because I didn't have that calendared myself."

¶7 The court pointed out that Burick had appeared at the pretrial conference on March 22, suggesting she had, in fact, known about it. Burick responded, "I appeared by phone, because I got notice that it was being set up, and so I appeared by phone." The court then commented that it had asked Burick at the pretrial conference about Michaela's failure to appear. Burick attempted to clarify what she had previously told the court by responding, "I stated I hadn't spoken with her and I hadn't, Judge. I hadn't. I did not give her notice." The court responded, "All right. And I think you did say you hadn't spoken with her, but I hear that a lot in these hearings and that generally means that the client hasn't been in touch with the attorney." The court then denied the motion to set aside the default because "there is no meritorious defense being even tendered . . . ." The court proceeded with the severance hearing, during which Burick neither cross-examined any witnesses nor presented any testimony, apparently believing, based on an earlier discussion with the court, that she could not do so once the court had defaulted Michaela.

¶8 On appeal, Michaela contends she was denied the effective assistance of counsel. She argues that she was defaulted because Burick failed to give her notice of the March 22 pretrial conference and, consequently, the juvenile court did not permit her to cross-examine witnesses or present evidence at the termination hearing. Additionally, Michaela maintains that Burick was ineffective because Burick filed a deficient motion to set aside the default. As a result, Michaela was unable to properly present her request for relief from the default. We agree. Under the circumstances, we also conclude the juvenile court abused its discretion when it refused to set aside the default. *See John C. v. Sargeant*,

208 Ariz. 44, ¶ 13, 90 P.3d 781, 784 (App. 2004) ("[A] finding of good cause for a failure to appear is largely discretionary.").

¶9 Rule 64, Ariz. R. P. Juv. Ct., applies to proceedings to terminate parental rights and provides that a parent must be served with a copy of the motion or petition for termination and notice of all relevant hearings and must be informed of the consequences of failing to attend such hearings. Specifically, Rule 64(C) states that the notice must "advise the parent . . . that failure to appear at the initial hearing, pretrial conference, status conference or termination adjudication hearing, without good cause, may result in a finding that the parent . . . has waived legal rights, and is deemed to have admitted the allegations in the motion or petition for termination." *See also* A.R.S. § 8-863(A). Rules 65(C)(6)(c) and 66(D)(2) complement Rule 64(C), providing that, if a parent has received the notice required by Rule 64(C) and fails to appear at the initial severance hearing or the termination adjudication hearing, respectively, the parent may be deemed to have waived his or her rights and admitted the allegations of the severance motion or petition, and the case may proceed in the parent's absence. *See also* § 8-863(C) (providing that, if parent fails to appear at severance hearing after receiving notice required by § 8-863(A), court "may find that the parent has waived the parent's legal rights and is deemed to have admitted the allegations of the petition by the failure to appear" and may terminate rights based on record and evidence).

¶10 This court held in *Adrian E. v. Arizona Department of Economic Security*, 215 Ariz. 96, ¶ 12, 158 P.3d 225, 229 (App. 2007), that a parent who has received the

notice required by Rule 64(C) and who fails to appear at a status conference, as opposed to the initial termination and termination adjudication hearings addressed in Rules 65(C)(6)(c) and 66(D)(2), may be "defaulted." It follows that the same is true, then, of a parent's failure to attend a pretrial conference, one of the kinds of hearings specified in Rule 64(C). But it is also clear, as discussed below, that a parent may not be "defaulted" for failing to attend a required hearing if the parent did not have notice of the hearing. At the very least, lack of notice is good cause for failure to appear. Ariz. R. P. Juv. Ct. 64(C); *see In re Maricopa County Juv. Action No. JS-4942*, 142 Ariz. 240, 242, 689 P.2d 183, 185 (App. 1984) (parent's rights violated if "improperly notified of the wrong hearing dates").

¶11 Michaela relies on *Donald W., Sr. v. Arizona Department of Economic Security*, 215 Ariz. 199, 159 P.3d 65 (App. 2007), for the standard for evaluating claims of ineffective assistance of counsel in parental termination proceedings. In that case, Division One of this court had found the test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), for determining claims of ineffective assistance of counsel in criminal cases not workable in actions to sever parental rights and essentially announced a new standard for such claims. *See John M. v. Ariz. Dep't. of Econ. Sec.*, 217 Ariz. 320, ¶ 8, 173 P.3d 1021, 1023-24 (App. 2007). Our supreme court subsequently vacated material portions of *Donald W.* and redesignated the remaining portions as a memorandum decision. *John M.*, 217 Ariz. 320, ¶ 8, 173 P.3d at 1024. In *John M.*, however, this court recently addressed the question whether "ineffective assistance of counsel justif[ies] reversal of a juvenile court's order terminating parental rights and, if so, under what circumstances?" *Id*. ¶ 11.

¶12 Agreeing with ADES in *John M.*, we found no reason to reject the *Strickland* test in its entirety simply because the Supreme Court, in articulating the test, had considered a criminal defendant's rights under the Sixth Amendment, and the Sixth Amendment is not implicated in parental severance proceedings. 217 Ariz. 320, ¶ 14, 173 P.3d at 1025. Rather, we reasoned that the court in *Strickland* had not "rel[ied] on the Sixth Amendment to the exclusion of due process concerns, but recognized 'the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial . . . guarantee[d] . . . through the Due Process Clauses.'" 217 Ariz. 320, ¶ 14, 173 P.3d at 1025, *quoting Strickland*, 466 U.S. at 684-85 (first alteration added). We concluded, "Thus, in severance proceedings, as in criminal cases, the 'ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.'" *Id.*, *quoting Strickland*, 466 U.S. at 696.

¶13 However, we also acknowledged in *John M.* that the differences between criminal proceedings and parental severance proceedings are relevant in determining whether a party is entitled to relief based on counsel's deficient performance. *Id.* ¶¶ 15-16. Among the factors we found relevant to such an inquiry were whether the proceedings had been "fundamentally unfair," whether "the result of the hearing is unreliable," and whether it can be said that, "had [counsel] conducted himself differently, the juvenile court would have reached a different result." *Id.* ¶ 19.

¶14 Assuming, without deciding, that the motion to set aside Michaela's default was deficient because Burick had not attached to it affidavits or other forms of sworn

statements,[3] it appears the juvenile court nonetheless addressed the motion on its merits. But whether the court denied the motion on its merits or denied it because it was deficient in form, we conclude—based on the record, including Burick's avowals at the hearing and the absence of evidence to the contrary—that the court abused its discretion by denying the motion under the circumstances. *See Sargeant*, 208 Ariz. 44, ¶ 13, 90 P.3d at 784. The combined effect of counsel's deficient performance and the court's error rendered the proceeding fundamentally unfair, in violation of Michaela's due process right to a fair hearing.

¶15 Nothing in the record even suggests Michaela had notice of the March 22 pretrial conference. Michaela's lack of notice and consequent failure to attend were the result of Burick's failure to tell her the pretrial conference had been rescheduled. The record supports Burick's avowals at the hearing on the motion to set aside the default that Michaela had no history of failing to appear at required hearings. For example, the record shows that Michaela attended a review hearing on December 7, 2006, and signed a form of notice, acknowledging that she knew the initial severance hearing would be held on January 4, 2007. Michaela appeared at the initial severance hearing on the date set and signed a similar form of notice, acknowledging that the pretrial hearing was set for February 16, 2007, and the severance hearing for March 1. As stated above, the court thereafter granted

[3]We question the propriety of applying general default practices in civil cases and, in particular, Rule 55, Ariz. R. Civ. P., to parental severance proceedings, given the fundamental right involved and due process implications. *See generally Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

the children's motion to continue the pretrial conference and the severance hearing and rescheduled the former for March 22 and the latter for March 30. The mailing certificates on the children's motion and the court's order granting the motion reflect that copies of both were mailed to a number of people, including Burick, but not to Michaela. There were no other hearings before the March 22 pretrial conference. After Michaela's "default," Burick repeatedly avowed that Michaela had not had notice of the hearing, and nothing in the record contradicts that assertion, and the court made no finding that it disbelieved her.

¶16 The circumstances of this case are diametrically different from those in *Christy A. v. Arizona Department of Economic Security*, 217 Ariz. 299, ¶ 12, 173 P.3d 463, 467 (App. 2007), in which Division One of this court recently rejected a mother's argument that the juvenile court had abused its discretion by denying her motion to set aside the default entered against her when she failed to appear for the severance hearing. There, as here, the date of the hearing had been changed. *Id*. ¶ 6. But, unlike here, counsel in *Christy A*. had mailed the mother a letter informing her of the new date, the caseworker had hand delivered a copy of the same letter, and the mother failed to establish good cause for her absence after having received notice. *Id*. ¶ 13.

¶17 The court acknowledged in *Christy A.* that the rules and case law governing defaults in other civil cases are "not completely analogous in parental cases," but it nonetheless found them instructive. *Id*. ¶ 16. Thus, it reasoned, a court may set aside an entry of default if there is "'good cause shown.'" *Id*., *quoting* Ariz. R. Civ. P. 55(c). Relying on civil case law under Rules 55 and 60, Ariz. R. Civ. P., the court found that the

"moving party must show that . . . mistake, inadvertence, surprise or excusable neglect exists and . . . a meritorious defense to the claims exists." Like the concept of default, "the concept of 'meritorious defense' is neither explicitly referenced nor implicit in either the statute or the juvenile court rules of procedure." 217 Ariz. 299, n.11, 173 P.3d at 468 n.11.

¶18 Even if we were to find the concept applicable in the context of this case, both Burick and the juvenile court seem to have been confused about what sort of "meritorious defense" would justify setting aside the default. As the court stated in *Christy A.*, "we consider a 'meritorious defense' to constitute nothing more than a good faith basis upon which to contend that the petitioner cannot prove a statutory basis for termination and/or that termination is not in the best interests of the child." *Id*. But, when Burick conceded the lack of a meritorious defense, she seemed to be referring to a defense for her failure to notify Michaela about the hearing. Although it is not entirely clear, the juvenile court appears to have concluded Michaela lacked a meritorious reason for failing to appear. On this record, that finding is unsupportable. Additionally, to the extent the court inferred that Michaela had failed to keep in touch with Burick and thus lacked good cause for failing to appear, that conclusion likewise is not supported by the record. In addition, even if this inference were correct, the juvenile court erred in denying the motion to set aside the default; Burick had admittedly failed to calendar the pretrial conference, so it would have made no difference here had Michaela contacted Burick.

¶19 In any event, because Michaela lacked notice of the hearing, the juvenile court erred in requiring her to establish a meritorious defense at all. A party cannot be defaulted

in the first instance if the party has not received proper notice. This principle is stated expressly in the juvenile rules, *see* Rules 65(C)(6)(c), 66(D)(2), Ariz. R. Juv. Ct., and supported by case law, *see In re Juv. Action No. JS-4942*, 142 Ariz. at 241-42, 689 P.2d at 184-85. The concept that a party must have had notice before being defaulted is also incorporated in Rule 55, Ariz. R. Civ. P.[4]

¶20 Based on the record before us, we agree with Michaela that Burick rendered ineffective assistance when she admittedly failed to calendar the new pretrial conference date and failed to notify Michaela that the pretrial conference and severance hearing dates had changed. Because the record established Michaela did not have notice of the pretrial conference, the juvenile court abused its discretion when it defaulted her, refused to find the lack of notice constituted good cause for her failure to appear at the pretrial conference, and denied Michaela's motion to set aside the default. The combined errors of counsel and the court resulted in a proceeding that was fundamentally unfair to Michaela. She was deemed to have waived her procedural rights and admitted the allegations of the motion to terminate her parental rights, and her attorney was led to believe that she could neither cross-examine the witnesses who testified at the severance hearing nor present evidence on Michaela's behalf. We therefore vacate the juvenile court's order of March 30, 2007, terminating

[4]The rule presupposes that a party has been served with the appropriate pleadings, providing the party with the first notice, and the party must be served with the application for entry of default, which is not deemed complete until ten days after it is filed. Ariz. R. Civ. P. 55(a); *see generally Hilgeman v. Am. Mortgage Sec., Inc.*, 196 Ariz. 215, ¶¶ 13-15, 994 P.2d 1030, 1034-35 (App. 2000); *see also Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 189-90, 836 P.2d 398, 402-03 (App. 1992).

Michaela's parental rights to Alex and Kaleb, and reverse the court's order denying Michaela's motion to set aside the entry of default.[5] This matter is remanded for further proceedings consistent with this decision.

_____
GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
PHILIP G. ESPINOSA, Judge

[5]Because we find Michaela did not receive notice of the pretrial conference, we need not address her additional argument that there was insufficient evidence to justify termination of her parental rights.